STATE OF MICHIGAN

IN THE SUPREME COURT

TOMO PERKOVIC,

Plaintiff-Appellee,

v

AARON WILLIAM BROWN,

Defendant-Appellant.

Supreme Court No.
Circuit Court No. 2000-4399-NI
Court of Appeals No. 235699

GERALD A. GORDINIER (P37460)
Attorney for Plaintiff
245 Barclay Circle, Ste. 200
Rochester Hills, Michigan 48307
(248) 852-2111

JOHN A. LYDICK (P23330)
Attorney of Counsel for Defendant-Appellee
30700 Telegraph Rd., Ste 3475
Bingham Farms, MI 48025-4571
(248) 646-5255

SCHOOLMASTER, HOM, KILLEEN
SIEFER & ARENE
JAMES P. O'SULLIVAN
Attorneys for Defendant Appellee
75 N. Main St., Ste. 300
Mount Clemens, MI 48043-5616
(810) 465-8230

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PLAINTIFF'S RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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II. ORDER APPEALED AND RELIEF SOUGHT

Plaintiff, Tomo Perkovic, filed a Complaint asserting negligence for an automobile accident which left Mr. Perkovic disabled. Upon completion of discovery, Defendant filed a Motion for Summary Disposition, and accompanying Brief in Support, based upon MCR 2.116(C)(7), (8), and (10). May 10, 2001, Plaintiff filed his Answer and Brief in Support.

As introduced in the parties' Statement and Counter Statement of Facts, each party's vehicle faced each other at an intersection. Plaintiff stated he was waiting at a yellow light in the left turn lane, moved up under the light, waited and turned. As Plaintiff turned, Defendant came through the intersection from the opposite direction, striking Plaintiff's automobile. Defendant argues, without citation to any record, that when he was thirty feet away from the intersection, last time he looked, the light was green. Plaintiff argues by the time Defendant entered the intersection, the light was red, because of the passage of time between Plaintiff's observation of the yellow light and his ultimate turn.

Circuit Court Judge Deborah A. Servitto heard oral argument on May 21, 2001, and placed the decision under advisement, pending her reading of Plaintiff's entire deposition transcript. The conflict in this case lies in the accident itself. The trial court's decision was based upon MCLA 500.3135(2)(b):

> Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

The Court ultimately granted Defendant's Motion on July 5, 2001, deciding that "the record evidence would only permit reasonable minds to conclude plaintiff was more than 50% at fault in causing the accident." (Exhibit 1, Opinion and Order dated July 5, 2001, p. 5).

Plaintiff filed an appeal of right with the Court of Appeals. In a unanimous unpublished decision, dated November 15, 2002, the Court of appeals reversed the trial court decision granting summary disposition, and remanded the case for further proceedings. (Exhibit 2, Court of Appeals Opinion.) The Defendant then moved for rehearing or reconsideration pursuant to MCR 7.215(H), to which Plaintiff answered. The Court of Appeals denied the Motion in an Order dated January 13, 2003. (Exhibit 3)

The Defendant has argued the Court of Appeals' decision is erroneous factually and legally, and now appeals pursuant to MCR 7.302(B)(5). As argued below, Plaintiff will show that the decision was not erroneous either factually, or legally, but instead preserves for trial a very important factual determination.

In the Court of Appeals' decision attached hereto, the Court reverses the trial court's decision on summary disposition. The Court again relied on MCLA 500.3135(2)(b), but noted significantly that the "determination of the parties' percentages of total fault is generally a question of fact for the trier of fact" pursuant to MCLA 600.6304(1). The Court of Appeals noted that the only evidence produced (Exhibit 4, Plaintiff's Deposition Transcript) determined the light was "yellow or red" upon Plaintiff's turn. (Exhibit 2, Perkovic v Brown, Docket No. 235699 (Court of Appeals November 15, 2002)). Any reference to Defendant being thirty feet away from the intersection when the light was green was improperly before the Court since there was no evidence to that effect in the record. Perkovic, at 2. The Court found that Plaintiff may have been partially negligent, but that whether Defendant was also partially negligent, was not determinable from the record. It became a question of fact for the jury, since there was a central factual dispute

over the color of the light, and the parties' distances from the intersection. The Court of Appeals reversed and remanded.

Now, the Defendant has filed a timely Claim of Appeal to this Court. WHEREFORE, Plaintiff requests this Court deny leave to appeal this issue correctly decided by the Court of Appeals, reinstating the Court of Appeals' decision reversing and remanding the case for more proceedings.

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IV. COUNTER-STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS COMMIT AN ERROR IN ITS DECISION REVERSING THE TRIAL COURT'S GRANTING OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION WHEN THERE IS CLEARLY A FACTUAL DISPUTE BETWEEN THE PARTIES REGARDING THE DEFENDANT'S NEGLIGENCE?

Plaintiff/Appellee says "NO"

Defendant/Appellant says "YES"

V. COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Tomo Perkovic filed a Complaint for auto negligence on October 25, 2000 against Defendant Aaron Brown. At the time of the accident, Mr. Perkovic was proceeding southbound on Saal, and in the process of turning eastbound onto 19 Mile Road at approximately 5:00 p.m. on November 5, 1999. (Exhibit 4, Deposition Transcript of Tomo Perkovic, p.13, ln. 16-20) At the same time Aaron William Brown, was driving northbound on Saal Road near 19 Mile Road and ran the red light at the intersection of Saal Road and 19 Mile Road. (Exhibit 4, Deposition Transcript of Tomo Perkovic, p. 31, ln. 13-24; p. 16, ln. 1-12).

Although Plaintiff testified he did not see Defendant's vehicle until impact (Exhibit 4, Dep. Tr. pp. 19, 20, 26, 30, 36), and that he never actually saw the light turn red (Exhibit 4, Dep. Tr. pp. 18, 31), one can logically conclude how the accident occurred from what he did observe. When Mr. Perkovic last saw the light, it was yellow (Exhibit 4, Dep. Tr. pp. 20,31) as he waited in the left turn lane. Mr. Perkovic then moved under the light and could not see it anymore. (Exhibit 4, Dep. Tr. pp. 17-18.)

Plaintiff testified at deposition that he had been waiting to turn behind other cars. Also in the left turn lane, that the car before him proceeded to turn left on a yellow light, and that he then moved up under the light. At that point he observed at least one vehicle already stopped for the light on the northbound side. Mr. Perkovic stopped and specifically looked for clear traffic and then turned (Exhibit 4, Dep. Tr. pp. 18-20, 27, 31.) The conclusion of negligence logically flows as from the time the vehicle in front of him had turned on a yellow light to the point when Mr. Perkovic ultimately made his turn, there had

been enough time during which the light would have turned red. (Exhibit 4, Dep. Tr. p. 31.) This is substantiated by Mr. Perkovic's testimony that he observed a vehicle already stopped for the light on the northbound side. (Exhibit 4, Dep. Tr. p. 31.)

Plaintiff testified that he determined Defendant was speeding because the speed limit was 35 mph (Exhibit 4, Dep. Tr. p. 36), he had looked for northbound traffic before he turned as the first car in line in the turn lane, and did not see any approaching vehicles (Exhibit 4, Dep. Tr. pp. 26, 27.)

As a result, Defendant collided with the Plaintiff and Plaintiff suffered permanent and serious injuries. (Exhibit 4, Dep. Tr. p. 38, ln. 1-10.) As a result of the wrongful conduct of the Defendant, Plaintiff filed his Complaint alleging negligence.

Upon completion of discovery, Defendant filed on April 16, 2001, Defendant's Motion for Summary Disposition and Brief in Support, said Motion seeking relief pursuant to MCR 2.116(c)(7), (8) and (10).

Accordingly, Plaintifft, in preserving his right to appeal, had to be filed on May 10, 2001, his Answer to Defendant's Motion for Summary Disposition and Brief in Support.

Subsequent to the filing of the respective pleadings, the Honorable Circuit Court Judge, Deborah A. Servitto, hearing oral arguments, including Plaintiff's objection to Defendant's Motion, on May 21, 2001 as to Defendant's Motion of Summary Disposition, placed her decision under advisement. (Exhibit 5, Transcript of Oral Argument for Summary Disposition dated May 21, 2001, p. 9, ln. 24-25.)

Ultimately on July 5, 2001, the Circuit Court Judge, Deborah A. Servitto, issued her Opinion and Order granting Defendant's Motion for Summary Disposition pursuant to MCR

2.116(c)(10), and in doing so, thereupon dismissed Plaintiff's Complaint with prejudice pursuant to MCR 2.116(i)(l). (Exhibit 1).

The Trial Court, in its interpretation of facts and its application of MCLA 257.612(1)(c) and MCLA 500.3131(2)(b), improperly determined that the Plaintiff was more than fifty (50%) percent negligent in the cause of the automobile accident between the parties. (Exhibit 1)

Plaintiff then filed a timely Appeal of Right, to which Defendant responded. The Court of Appeals issued a per curium decision on November 15, 2002. (Exhibit 2) The Court of Appeals reversed the Trial Court's decision and remanded the case for further proceedings.

Defendant then made a timely Motion for Rehearing which was denied by the Court of Appeals in an Order dated January 13, 2003. (Exhibit 3) Now Defendant submits this Application for Leave to Appeal which should be denied for the foregoing reasons.

VI. ARGUMENT

A. DID THE COURT OF APPEALS COMMIT AN ERROR IN ITS DECISION REVERSING THE TRIAL COURT'S GRANTING OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION WHEN THERE IS CLEARLY A FACTUAL DISPUTE BETWEEN THE PARTIES REGARDING THE DEFENDANT'S NEGLIGENCE?

1. STANDARD OF REVIEW

a. STANDARD FOR APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT.

Defendant filed this Application for Leave to Appeal to the Michigan Supreme Court pursuant to MCR 7.302(B)(5) which states:

(B) Grounds. The application must show that . . .

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals;

Defendant summarily states in his Application (p. 9-10) that the Court of Appeals decision was clearly erroneous and in "direct conflict" with other decisions of the Michigan Supreme Court and Court of Appeals. However, Defendant fails to cite even one case in conflict with the Court of Appeals decision here.

Defendant's Application for Leave to Appeal should be denied because as the following arguments will demonstrate, the decision below in the Court of Appeals was not erroneous at all. Furthermore, the Court of Appeals decision is right in line with previous cases (cited infra) holding that this issue is well within the province of the jury and not properly determined by a summary disposition motion.

b. STANDARD OF REVIEW FOR A SUMMARY DISPOSITION MOTION PURSUANT TO MCR 2.116(C)(10)

Although Defendant's Motion for Summary Disposition was based upon MCR 2.116(C)(7), (8), and (10), the trial court granted the Motion based upon MCR 2.116(C)(10). This Court reviews summary disposition motions de novo upon a review of the entire record. Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817, 822 (1999). Judge Servitto granted this motion based upon MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

Maiden, at 120. Further, the Courts have stated that they are liberal in finding a genuine issue of material fact. Meretta v Peach, 195 Mich App 695, 697; 491 NW2d 278 (1992).

c. CIRCUMSTANTIAL EVIDENCE IS PROPERLY CONSIDERED IN A MOTION FOR SUMMARY DISPOSITION

As Plaintiff will show, there was a material factual dispute in this case. The crux of the case itself is an evaluation of the parties' testimony, and a credibility determination, as each party has a different version of the facts, as well as a different conclusion to be reached by them. There are no other independent witnesses known to the accident. Thus, the parties' testimony, as circumstantial evidence of the color of the light, may be used, and is necessary.

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In Kaminiski v. Grand Trunk W.R. Co., 347 Mich. 417, 422, 79 N.W.2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:
>
> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happed or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Skinner v. Square D. Company, 445 Mich 153, 164; 516 NW2d 475 (1994). In Skinner, the Court was considering a trial court's grant of summary disposition pursuant to MCR2.116(C)(10) as well. That products liability case involved the issue of causation in the accident to which there were no eyewitnesses, and the Court considered circumstantial

evidence.

Here, there are 2 eyewitnesses, Plaintiff and Defendant. Plaintiff has described a sequence of events which clearly determine some negligence on Defendant's part. The Plaintiff saw the light yellow, waited for a period of time and turned through the intersection, concluding that time had passed to where the light would have turned red, and Plaintiff could safely turn rather than remain under the light in the middle of the intersection.

The conclusion that the light would have turned red is not merely speculation as argued by Defendant. It is just the type of "reasonable inference" required by Skinner. It is not speculation to proffer that a yellow light turns red eventually. Defendant seems to argue that because no one saw the light red, it was never red. No matter how many times the Defendant uses all capital letters to claim that there is no evidence the light turned red, the light did turn red, as traffic lights do. The disputed fact remains as to when the light turned red and what the parties were doing at that time.

2. ANALYSIS

a. RELEVANT STATUTES

The trial court as well as the Court of Appeals, when making their determination, relied on the No Fault Act, MCLA §500.3103, et seq. as amended, specifically MCLA §500.3131(2)(b), which states

> Damages shall be assessed on the basis of comparative fault except that damage shall not assess in favor of a party who is more than 50% at fault.

Based upon this statute, the trial court determined "the record evidence would only permit reasonable minds to conclude Plaintiff was more than 50% at fault in causing the accident. (Exhibit 1, p 5)

The "record evidence" used by the trial court in this determination includes Defendant's assertion that "the traffic light was green was (sic) he was approximately thirty feet away from the intersection." (Exhibit 1, p. 3) This "assertion" of Defendant is free from any citation to the record, thus any such "assertion" should not be considered.

Defendant, Aaron William Brown, had an obligation to stop for a red light which was set against him. MCLA 257.612(1) states:

> (b) If the signal exhibits a steady yellow indication, vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection or a limit line when marked, but if the stop cannot be made in safety, a vehicle may be driven cautiously through the intersection.
>
> (c) If the signal exhibits a steady red indication, the following shall apply: (i) Vehicular traffic facing a steady red light alone, shall stop before entering the crosswalk on the near side of the intersection, or at a limit line when marked or if there is no crosswalk or limit line, before entering the intersection, and shall remain standing until a green indication is shown except as provided in subparagraph (ii).

From Plaintiff's deposition testimony, it can be ascertained that Plaintiff waited a sufficient period of time before attempting to execute his left turn. Plaintiff believed that he was entitled to assume that the Defendant, Aaron William Brown, would obey the law and would stop for a red light which was set against him, or at a minimum, the Defendant, in approaching the intersection on a yellow light, would have had a duty to stop safely. Based upon the facts as set forth to the Trial Court, reasonable minds could easily differ as to the cause of the accident, the percent of negligence attributable to each party, especially taken in the most favorable light of the nonmoving party as it related to Defendant's Motion for Summary Disposition. Under such circumstances, such a question of fact should be left to a jury as the trier of fact.

In applying fault when a party violates a statute or ordinance, it is a question of fact for the jury. Plaintiff relies on the case of Dodd v Secretary of State, 390 Mich 606, 612-613; 213 NW2d 109 (1973) which stated:

> Plaintiff testified that he looked both ways and saw no traffic as he started to cross Grand River. He also testified he stopped and again and looked both ways when he reached the middle of the street. He did not see any lights or hear any brakes or horn prior to being struck.
>
> Mrs. Autrey testified she saw no lights other than tail lights on the hit-run car. She saw no beams from its headlights.
>
> [1] These facts alone are sufficient to enable this case to go the jury. A jury could have found that the hit-run car was traveling without lights, in violation of our Motor Vehicle Code, and by so doing was negligently operated.

Here, the jury has to determine from the parties' testimony, which party actually violated an ordinance. Then, after that assessment, the jury has to ascertain relative fault between them. At this point, from the Plaintiff's testimony (that being the only record evidence offered), a court cannot ascertain statutory violations of the parties and especially cannot assign fault accordingly. This evaluation involves too many factual disputes which need to be determined by witness credibility, well within the province of the jury. Clearly, it is the jury's responsibility as a trier of fact, to determine whether a party is more than fifty (50%) percent at fault. In that regard, reliance is placed upon the previously cited statutes of MCLAA 257.612(1)(b) and (c),

b. EVIDENCE CONSIDERED

The trial court's interpretation of the Plaintiff's testimony as given during the course of his deposition was in fact complicated based upon the Plaintiff's ethnic background and his use of the English language during the course of his answering questions (Exhibit 5,

pp. 8, 21-23). As disclosed to the Trial Court, the Plaintiff waited long enough that he believed the light to be red. Based upon such testimony, if the trier of fact were to believe the same to be true, that he had waited a sufficient time for the light to turn red, then the Defendant, by virtue of entering on the red light, violated the respective statute as stated. In the alternative, the trier of fact could also determine that the Defendant could not enter on a yellow light if he had sufficient time to stop and that such alternatives clearly create a genuine issue of material fact.

The Court further errored in its determination that the Defendant could not have possibly come to a safe stop, and was entitled to drive through the intersection when the light was clearly designated as yellow, the same being a further abuse of the Court's interpretation of the facts. Therefore, the trial court inappropriately relied upon those interpretations in determining its decision as expressed in the Opinion and Order granting Summary Disposition to the Defendant. It is clear from the record evidence, which was submitted to the Court, that there existed a question of fact which should have been left to the trier of fact, that reasonable minds could have differed in determining the issue of fault, as opposed to concluding that Appellant was more than fifty (50%) percent at fault in the cause of the accident.

VII. RELIEF

Plaintiff/Appellee requests this Honorable Court DENY Defendant/Appellant's Application for Leave to Appeal, remanding the case back to the trial court for further proceedings.

GERALD A. GORDINIER (P37460)
Attorney for Plaintiff
245 Barclay Circle, Ste. 200
Rochester Hills, MI 48307
(248) 852-2111

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